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10/573,871

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Nigel Cronin

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7590

01/13/2011

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EXAMINER

DELLA, JAYMI E

ART UNIT

PAPER NUMBER

3739

MAIL DATE

DELIVERY MODE

01/13/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/573,871	<b>Applicant(s)</b> CRONIN ET AL.	
	<b>Examiner</b> JAYMI DELLA	<b>Art Unit</b> 3739	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 22 November 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-37,39,41-50,52-70 and 72 is/are pending in the application.
- 4a) Of the above claim(s) 1-37,42,46,68 and 69 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 39, 41, 43-45, 47--50, 52-67, 70, and 72 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 22 November 2010 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)         | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

1. The following is a Final Office Action on the merits. Claims 39, 41, 43-45, 47--50, 52-67, 70, and 72 are addressed below.

### ***Response to Amendment***

2. Acknowledgment is made to the amendment received 11/27/2010, amending claims 39, 41-44, 52-53, 60-70, cancelling claims 40, 51, and 71, and adding new claim 72.

3. Applicant has requested reconsideration of the withdrawal of claims 42, 46, and 68-69. The Examiner maintains that these claim read upon non-elected species as set forth in the previous Office Action. Thus, claims 42, 46, and 68-69 remain withdrawn.

4. Applicant's amendments to the claims 43-44 are sufficient to overcome the drawings objections set forth in the previous office action. However, the objection to Fig. 2(c), 4(c), and 6(b) still remains.

5. Applicant's amendments to the claims are sufficient to overcome the claim objections set forth in the previous office action.

6. Applicant's amendments to claims 52 and 64 are sufficient to overcome the 35 USC 112, first paragraph rejections set forth in the previous office action.

7. Applicant's amendments to claims 39, 43, 44, 52-53, 56, 60, 64, and 70 are sufficient to overcome the 35 USC 112, second paragraph rejections set forth in the previous office action.

### ***Drawings***

8. The drawings are objected to because of shaded figures (Fig. 2C, 4c, 6b).
9. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either “Replacement Sheet” or “New Sheet” pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Claim Objections***

10. Claims 52 and 70 objected to because of the following informalities: since Applicant has amended claim 52 to include all of the limitations of claim 39 and new claim 72 includes all the limitations of claim 39, the recitation of “according to claim 39” in Line 2 is not needed. Appropriate correction is required.

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11. Claim 49 objected to because of the following informalities: change "claim 40" to --claim 39--, since the limitations of claim 40 were incorporated in claim 39 and claim 40 was cancelled. Appropriate correction is required.

***Claim Rejections - 35 USC § 112***

12. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

13. Claims 39, 41-50, 52-70, and 72 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

14. Claim 39 recites the limitation "the varicose vein" ll. 8 and 15. Previously only the plural of "varicose veins" was recited. There is insufficient antecedent basis for this limitation in the claim.

15. Claim 50 recites the limitation "the inner conductor" in ll. 2 and "the outer casing" in ll. 2-3. There is insufficient antecedent basis for this limitation in the claim.

16. Claim 50 recites "...wherein said elongate conductor comprising a portion of the inner conductor of a coaxial cable protruding axially beyond the outer casing of said cable" is grammatically incorrect and is unclear if there is a second coaxial cable being recited. It is suggested to rephrase as follows: --...wherein said elongate conductor is comprised of a portion of an inner conductor of the coaxial cable which protrudes axially beyond an outer casing of said cable". The claim will be interpreted in this manner.

***Claim Rejections - 35 USC § 102***

17. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**18. Claims 39, 44, 49, 50 are rejected under 35 U.S.C. 102(b) as being anticipated by Rosen et al. (5,129,396).**

**19. Concerning claim 39, as illustrated in Fig. 1a, Rosen et al. disclose an applicator (flexible catheter 8) for applying radiation to varicose veins, the applicator comprising:**

**an elongate member (flexible catheter 8), the elongate member including an emitter (antenna 15), the emitter (15) being coupled to a source of microwave radiation and being adapted to emit said radiation (antenna 15 is coupled to microwave frequency signal source 44 and radiates electromagnetic energy away from the distal end 20 of catheter 8; Col. 3-4, ll. 59-9);**

**wherein the emitter (15) includes**

**a radiation emitting portion (distal end 20, beginning at shaped portion of flexible jacket 26) made of dielectric material (dielectric material 24) and having an axis of elongation and including a generally conical tapering portion, the tapering portion forming a tip for insertion into the varicose vein (radiation emitting portion 20 has a generally conical tapering portion forming a tip capable of being inserted into a varicose vein), and**

**an elongate conductor** (inner conductor 12 and outer conductor 14) **within and extending at least partially along the radiation emitting portion (20),**

**the radiation emitting portion being shaped and dimensioned so as to emit said radiation at a predetermined intensity in a field of limited dimensions adjacent thereto, whereby said field is disposed, in use, substantially around the midsection of said radiation emitting portion and around said tip, whereby occlusion of the varicose vein within said field is effectively accomplished**

(microwave energy is radiated in directions outward from antenna 15 and the field is disposed substantially around the midsection of the radiation emitting portion 20 and its tip and is thus capable of effectively accomplishing occlusion of the varicose vein; Col. 4-5, ll. 68-26, Fig. 3a-3d).

The Examiner notes to Applicant that because there is no recitation of the radiation emitting portion to be entirely made of dielectric material, Rosen et al. meets the claim limitations since the radiation emitting portion (20) includes dielectric material (24).

The Examiner notes to Applicant that the applicator of Rosen et al. is capable of effectively accomplishing occlusion of a varicose vein because there is no recitation of the degree of energy emitted from the microwave radiation source.

**20.** Concerning **claim 44**, Rosen et al. disclose the elongate member (8) has antenna (15) coupled to the source of radiation (44) via coaxial cable (10) (Col. 3, ll. 30-33, Fig. 1a).

**21.** Concerning **claim 49**, Rosen et al. disclose the radiation emitting portion (20) to include a substantially cylindrical portion integral with the tapering portion (Fig. 1a).

**22.** Concerning **claim 50**, Rosen et al. disclose the elongate conductor (12/14) comprising a portion of to comprise an inner conductor (12) of the coaxial cable (10) which protrudes axially beyond the outer casing (26) of the cable (10) in the distal end (20) (Fig. 1a).

***Claim Rejections - 35 USC § 103***

**23.** The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**24.** **Claim 41 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen et al. (5,129,396), as applied to claim 39, in view of Taylor (4,534,347, previously cited).**

**25.** Concerning **claim 41**, Rosen et al. fail to disclose the elongate conductor extending along the entire length of the radiation emitting portion. However, Taylor discloses a microwave radiating applicator that has a conductor (51a) that extends along the entire length of a radiation emitting portion into (entire tip within coaxial shield 54a) (Fig. 6). At the time of the invention, it would have been obvious to one of ordinary skill in the art to extend the conductor all the way to the tip, along the length of the entire radiation emitting portion, in order to provide the benefit of creating a desired radiation field, and since such a modification would have involved a mere change in the size of a

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component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

**26. Claim 43 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen et al. (5,129,396), as applied to claim 39, in view of Warner et al. (5,693,082, previously cited).**

**27.** Concerning **claim 43**, Rosen et al. fail to disclose a temperature sensor on the elongate member that is preferably comprised of a thermocouple or fiber optic sensor. However, Warner et al. disclose a microwave ablation catheter (50) that has an elongate member (51), and a radiation emitting portion (80) that includes an dielectric emitter and conductor (56, 75) and a temperature sensor (65) on the elongate member (51), where the temperature sensors are comprised of thermocouples or fiber optical sensors (Col. 5, ll. 61, Col. 8, ll. 22-23; Fig. 6). At the time of the invention, it would have been obvious to one of ordinary skill in the art to include a temperature sensor on the elongate member in order to provide the benefit of being able to detect overheating of tissue or catheter elements and damage to the catheter, thermometry element conditions in the event of catastrophic damage as taught by Warner et al. (Col. 6, ll. 24-31).

**28. Claims 45 and 47-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen et al. (5,129,396), as applied to claim 44, in view of Takehana et al. (4,930,494, previously cited).**

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29. Concerning **claims 45 and 47-48**, Rosen et al. fail to disclose a series of regularly spaced alternating light and dark colored markings that are about 1 cm long provided on the exterior surface of the coaxial cable along its length. However, Takehana et al. disclose an endoscope system with a cable (catheter shaft) that has alternating, regularly spaced, predetermined width ( $\Delta l$ ), light and dark markings along its length. At the time of the invention, it would have been obvious to have regularly spaced alternating light and dark colored sections along the exterior of the cable's length in order to provide the benefit of detecting the distance of insertion of the cable as taught by Takehana et al. (Col. 7, ll. 44-54, Col. 18, ll. 10-15; Fig. 1, 8, 35) Further, it would have been an obvious matter of design choice to one having ordinary skill in the art at the time the invention was made to space the sections at 1 cm, since applicant has not disclosed that 1cm sections solves any stated problem or is for any particular purpose and it appears that the invention would perform equally as well with any width or length depending on the procedure being performed (i.e., with a pediatric patient or an adult).

30. **Claims 52-64 and 70 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen et al. (5,129,396), as applied to claim 39, in view of Junior (6,520,928, previously cited) and Lattner et al. (2004/0215236).**

31. Concerning **claims 52 and 55**, Rosen et al. disclose the applicator as discussed in the rejection of claim 39, but fail to disclose a motion rate sensor arranged, in use, for detecting the rate of movement of the applicator; a control unit coupled to the sensor for

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receiving the motion rate signals output thereby; wherein the control unit is configured to calculating the speed of motion of the applicator using said motion rate signals, and control the amount of radiation supplied to the applicator and/or the rate of motion of the applicator in dependence upon said calculated speed of motion. However, Junior discloses a medical injection system (10) where a motion rate sensor (25), comprised of ring (156) that has a plurality of uniformly spaced holes (158) and optical reader (160), which generates a pulse upon the passage of one of the holes (158), detects the rate of forward or backward movement of an applicator (128) which functions to eject or aspirate fluids from needle (18) and is mounted on the end of an elongate threaded shaft (23), or cable, and thus detects the rate of movement of the applicator (128); a control unit (16) that is coupled to the sensor and receives the motion rate signals that is configured to calculate the speed of motion of the applicator using the motion rate signals and control the rate of motion to adjust the flow rate and volume of liquid expelled from the needle (18). At the time of the invention, it would have been obvious to one of ordinary skill in the art to use a motion rate sensor which sends rate signals to a control unit to calculate the speed of an applicator and then control the motion rate of the applicator depending on its speed in order to provide the benefit of precisely monitoring and adjusting the effect of the applicator tip as taught by Junior. (Col. 2, ll. 31-45, Col. 6, ll. 22-28; Fig. 2 and 9). Rosen et al. as modified by Junior fail to disclose controlling an amount of radiation supplied to the applicator by the radiation source based on the speed of motion of the applicator. However, Lattner et al. disclose using a motion sensor (34) to detect motion and a control unit that controls the application of

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stimulation energy to the applicator (32) based on an output of the motion sensor. At the time of the invention, it would have been obvious to one of ordinary skill in the art to control the amount of radiation to the applicator based on the motion rate signals from the motion detector in order to provide the benefit of providing an energy of an appropriate timing, level, pattern, and/or frequency to achieve a desired function as taught by Lattner et al. (Abstract, [0019], [0035], [0051]; Fig. 1; claims 30, 34, and 40).

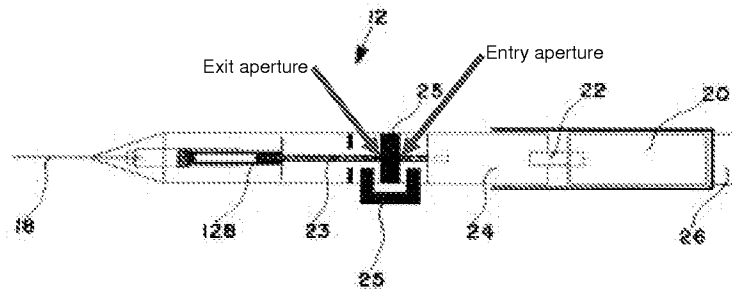
32. Concerning **claims 53-54 and 56**, Junior further discloses that the control unit (16) polls the optical reader (160) when the optical reader (160) generates pulses upon passage of a hole (158) in ring (156) that are transmitted to control unit (16) to adjust the speed and duration of operation of the motor (20), and then calculates the rotational speed of ring (156) using the counts from the pulses generated by the optical reader (160) (Col. 8, ll. 30-34). It is inherent that in order to calculate the linear speed/rate of motion of the applicator, the rotational speed is calculated using the known constants of the radius of the wheel and the total number of uniformly spaced holes (158) to determine an arc length. Then, knowing that rotational speed is equal to an angle  $\theta$  generated by the arc length between two holes divided by the time between the pulsed signals of the two holes, the linear speed is calculated. Thus, at the time of invention it would have been obvious to one of ordinary skill in the art to determine the speed of the cable by using a determined difference value and conversion factor  $R$  since there are a limited number of ways of determining a rate of linear motion, and thus, it would have been obvious to one of ordinary skill in the art to try all of the methods.

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33. Concerning **claims 57-59**, Junior discloses a display device (19) under the control of control unit (16) that is capable of displaying the calculated speed of motion applicator and a graphical representation in the form of a speedometer of that speed of motion (Col. 2, ll. 61-62).

34. Concerning **claim 60**, Rosen et al. disclose the elongate member (8) has antenna (15) coupled to the source of radiation (44) via coaxial cable (10) (Col. 3, ll. 30-33, Fig. 1a). Junior further discloses the motion rate sensor comprising a housing (25), to which, in use, the cable (23) moves, a detection unit (156, 160) disposed within the housing (25). The detection unit (156, 160) includes an optical reader (160) which inherently includes a conversion device adapted for generating detector signals caused by motion of the cable and processing circuitry that is adapted for receiving detector signals and outputting motion signals indicative of the rate of movement of the article, since the optical reader is capable of knowing when a hole passes by, generating a pulse upon passage of the hole, and sending this signal to the control unit (16) (Fig. 2).

35. Concerning **claims 61-63**, Junior further discloses that the housing (25) includes at least one aperture that includes an entry aperture, through which the cable enters the housing and an exit aperture, through which the cable exits the housing, that permits **substantially** linear motion of the cable relative to the housing as illustrated in annotated Fig. 2 below.



36. Concerning **claim 64**, Junior further discloses the conversion device (156, 160) to include a radiation detector in the form of an optical reader that is capable of receiving a second radiation from an optical emitter (i.e., the sun) and generating detector signals in dependence on said received second radiation (Col. 8, ll. 30-34).

37. Concerning **claim 70**, Junior further discloses the conversion device (156, 160) to include a rotatable member (156) that contacts the cable (23) and is rotated when the conversion unit is in use; Junior also further discloses an electromechanical device (160) that is adapted to generate detector signals in dependence upon the rate of rotation of the rotatable member (156). (Col. 6, ll. 23-38, Col. 8, ll. 26-34; Fig. 8)

38. **Claims 65 and 67 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen et al. (5,129,396) in view of Junior (6,520,928, previously cited) and Lattner et al. (2004/0215236), as applied to claim 64, in further view of Takehana et al (4,930,494, previously cited).**

39. Concerning **claim 65**, Junior further discloses the radiation to be optical radiation since the detection device is an optical reader (160). Rosen et al. as modified by Junior fail to disclose the detection unit further including an optical emitter for emitting the optical radiation, and the radiation detector being disposed so as to receive optical

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radiation after reflection from a cable. However, Takehana et al. disclose a cable with striped markings of uniformly distributed light and dark sections and a sensor portion (5) for detecting the striped patterns of marking portion (4) on the cable. Sensor portion (5) includes three photosensors (5a,b,c) that are composed of a light emitting element, or optical emitter, and light receiving element, or radiation detector that receives reflections of the optical emitter from the cable (Col. 7-8, ll. 44-23, Col. 18, ll. 10-26; Fig. 1-2 and 35). At the time of the invention, it would have been obvious to one of ordinary skill in the art to have an optical emitter emit a source of radiation that reflects off of light and dark markings of uniform distance and width to be received by a radiation detector in order to provide the benefit of allowing the device to operate where no natural optical emitter (i.e., the sun) is present.

40. Concerning **claim 67**, Rosen et al. as modified by Junior fail to disclose the cable having a plurality of markings or reflective elements disposed on its surface in a repetitive pattern along its length. However, Takehana et al. disclose an endoscope system with a cable (catheter shaft) that has alternating, regularly spaced, predetermined width ( $\Delta l$ ), light and dark markings along its length. At the time of the invention, it would have been obvious to have regularly spaced alternating light and dark colored sections along the exterior of the cable's length instead of on a rotating wheel with holes in order to provide an alternative method of detecting the distance of insertion of the cable as taught by Takehana et al. (Col. 7, ll. 44-54, Col. 18, ll. 10-15; Fig. 1, 8, 35), and in order to provide the benefit of having on less degree of error on the speed of the motion when having to convert the rotational speed of a ring to linear

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speed of an attached cable. Further, it would have been an obvious matter of design choice to one having ordinary skill in the art at the time the invention was made to space the sections at 1 cm, since applicant has not disclosed that 1cm sections solves any stated problem or is for any particular purpose and it appears that the invention would perform equally as well with any width or length depending on the procedure being performed (i.e., with a pediatric patient or an adult).

41. **Claim 66 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen et al. (5,129,396) in view of Junior (6,520,928, previously cited), Lattner et al. (2004/0215236), and Takehana et al. (4,930,494, previously cited), as applied to claim 65, in further view of Benaron et al. (5,762,609, previously cited).**

42. Concerning **claim 66**, as discussed in the rejection of claim 65 above, Takehana et al. disclose the optical emitter and radiation detector to comprise an integral device in sensor portion (5) (Col. 7, ll. 55-57; Fig. 1-2). Rosen et al. as modified by Junior and Takehana et al. fail to disclose a specific type of optical emitter, particularly an LED. However, Benaron et al. disclose a surgical tool that includes a radiation detector and LED optical emitter (Col. 4-5, ll. 57-19). At the time of the invention, it would have been obvious to one of ordinary skill in the art to use an LED as the optical emitter in order to provide the benefit lower power consumption and increased luminance.

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43. **Claim 72 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen et al. (5,129,396), as applied to claim 39, in view of Junior (6,520,928, previously cited).**

44. Concerning **claims 72**, Rosen et al. disclose the applicator as discussed in the rejection of claim 39, but fail to disclose a motion rate sensor arranged, in use, for detecting the rate of movement of the applicator; a control unit coupled to the sensor for receiving the motion rate signals output thereby; wherein the control unit is configured to calculating the speed of motion of the applicator using said motion rate signals, and control the amount of radiation supplied to the applicator and/or the rate of motion of the applicator in dependence upon said calculated speed of motion. However, Junior discloses a medical injection system (10) where a motion rate sensor (25), comprised of ring (156) that has a plurality of uniformly spaced holes (158) and optical reader (160), which generates a pulse upon the passage of one of the holes (158), detects the rate of forward or backward movement of an applicator (128) which functions to eject or aspirate fluids from needle (18) and is mounted on the end of an elongate threaded shaft (23), or cable, and thus detects the rate of movement of the applicator (128); a control unit (16) that is coupled to the sensor and receives the motion rate signals that is configured to calculate the speed of motion of the applicator using the motion rate signals and control the rate of motion to adjust the flow rate and volume of liquid expelled from the needle (18). At the time of the invention, it would have been obvious to one of ordinary skill in the art to use a motion rate sensor which sends rate signals to a control unit to calculate the speed of an applicator and then control the motion rate of

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the applicator depending on its speed in order to provide the benefit of precisely monitoring and adjusting the flow rate and volume of liquid expelled as taught by Junior. (Col. 2, ll. 31-45, Col. 6, ll. 22-28; Fig. 2 and 9).

### ***Response to Arguments***

45. Applicant's arguments with respect to claims 39, 41, 43-45, 47--50, 52-67, 70, and 72 have been considered but are moot in view of the new ground(s) of rejection.

46. In response to applicant's argument that Taylor is nonanalogous art (Pg. 24), it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Taylor clearly discloses a microwave applicator, and thus the Examiner maintains is analogous art. Further, the fact that the applicator is "for applying radiation to varicose veins" (claim 1) or as Applicant argues on Pg. 24 "for treating varicose veins", this is a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

***Conclusion***

47. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: Feldberg et al. (6,026,331), Talpariu et al. (6,171,302).

48. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAYMI DELLA whose telephone number is (571)270-1429. The examiner can normally be reached on M-Th 7:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Linda Dvorak can be reached on (571)272-4764. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Linda C Dvorak/  
Supervisory Patent Examiner, Art  
Unit 3739

/J. D./  
Examiner, Art Unit 3739  
January 5, 2011